No. 90-273

In The

Supreme Court of the United States

October Term, 1990

COMMISSIONER OF REVENUE OF THE STATE OF TENNESSEE,

Petitioner,

v.

NEWSWEEK, INC.; SOUTHERN LIVING, INC.; and PROGRESSIVE FARMER, INC.,

Respondents.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY THE STATE OF IOWA, AND THE STATES OF AMERICAN SAMOA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, KANSAS, MINNESOTA, MISSOURI, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, UTAH, VERMONT, WASHINGTON, WISCONSIN, WYOMING

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I. INTRODUCTORY STATEMENT

Pursuant to United States Supreme Court Rule 37.2, the signatory states submit this Brief as Amici Curiae in support of the Petition for a Writ of Certiorari. Since this Brief is being sponsored and filed by the aforementioned states, consent to its filing is not required. United States Supreme Court Rule 37.5.

II. OPINION BELOW

The Opinions of the Tennessee Supreme Court are reported in 789 S.W.2d 247 and 789 S.W.2d 251 (1990). The unreported Opinions of April 22, 1988 and of June 1, 1988 of the Chancery Court, 20th Judicial District, are contained in the Appendix attached to Petitioner's Petition for Writ of Certiorari.

III. INTEREST OF AMICI CURIAE

The signatory Amici states are deeply concerned with what they believe to be the far-reaching implications which flow from the Tennessee Supreme Court's decision in this case relating to a generally applicable state tax structure. In this regard, Tennessee's tax uniformly exempts all newspapers and uniformly taxes a wide variety of other publications sold at retail.

Amici strongly believe that a state should not be precluded by First Amendment guarantees from making reasonable choices of distinct types of publications, particularly newspapers, as subjects for tax exemption and,

having made that choice, should not be required to exempt all other publications, printed matter, or media. The Tennessee Supreme Court's decision negates that choice and its "all or nothing" approach requires that all speech be tax exempt if any of it is or, put another way, all speech be taxed if any of it is. Amici do not believe such a result to be the law and, indeed, believe that the decision is in conflict with prior and subsequent precedent of this Court. Moreover, that result does not enhance First Amendment guarantees and merely pressures state legislatures to tax all speech.

Most states impose sales and use taxes of general applicability. Virtually all of the states have some tax exemptions which implicate speech that have First Amendment protections and, also, impose such taxes upon retail sales of tangible personal property in general that will include publications or printed materials sold which are distinct from those entitled to a tax exemption. Also, state tax structures do not have ironclad identical tax treatment of all types of speech. It is important that this Court provide direction to states and taxpayers with respect to differential tax treatment of distinct speech.

IV. ARGUMENT

Tennessee, in common with most states in the Nation, imposes a generally applicable retail sales and use tax scheme. While most retail sales are subject to tax, T.C.A. § 67-6-329(a)(3) provides a tax exemption for all newspapers. Other types of publications, including magazines,

are subject to tax. The Tennessee Supreme Court essentially adopted an "all or nothing" approach whereby the tax exemption for newspapers dictates a corresponding exemption for all other publications. Under the rationale adopted by the Tennessee Court, it would be impossible for a state to tax publications and printed matter, such as books, greeting cards, and law briefs, even within the context of a generally applicable tax law, if the state exempted newspapers. In addition, this approach suggests that, within such context, all speech (printed or otherwise) must receive uniform state tax treatment.

State courts have issued conflicting decisions with respect to differential tax treatment of speech. Some state courts have adhered to Tennessee's "all or nothing" approach. In *Louisiana Life, Ltd. v. McNamara*, 504 So.2d 900 (La. App. 1987), a Louisiana Appellate Court invalidated the Louisiana sales tax that exempted newspapers but not magazines. In *Department of Revenue v. Magazine Publishers of America, Inc.*, 1990 Fla. Lexis 729 (May 31, 1990), the Florida Supreme Court also declared invalid a sales tax that exempted newspapers but not magazines. In *Dow Jones, Inc. v. Oklahoma*, 787 P.2d 843 (Okla. 1990), the Oklahoma Supreme Court invalidated a sales tax which exempted publications costing less than 75 cents and issued at least every three months or less, but not others, notwithstanding that this tax structure was not based upon content, did not single out the press for taxation, and did not result in only a handful of publications being taxed. In *McGraw-Hill, Inc. v. State Tax Commission*, 75 N.Y.2d 852, 552 N.E.2d 163 (1990), the New York Court of Appeals invalidated a New York net income apportionment system to the extent that it treated

print media different than broadcast media. In *Oklahoma Broadcasters Association v. Oklahoma Tax Commission*, 789 P.2d 1312 (Okla. 1990), the Oklahoma Supreme Court invalidated a sales tax to the extent that print media and broadcast media were treated differently. In this case, the Court opined that broadcaster's First Amendment rights were violated by a statute which allowed an industrial equipment and materials tax exemption for processing tangible personal property and which was available to manufacturers of print media because non-manufacturing broadcast media, under the law, did not receive any tax exemption for equipment and materials used in broadcast transmissions. These state court decisions are not consistent with the general rule that a statute which subsidizes some speech, but not all speech, is not inevitably subject to strict scrutiny. *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983).

In contrast, the North Carolina Supreme Court upheld a state use tax which exempted street vendors and door-to-door sales of newspapers in *Matter of Assessment of Additional North Carolina and Orange County Use Taxes Against Village Publishing Corporation*, 312 N.C. 211, 322 S.E.2d 155 (1984), *app. dismissed*, 472 U.S. 1001 (1985). It is difficult to see how this Court's summary affirmance of the North Carolina Court's decision is consistent with the Tennessee Court's decision and with the other cases mentioned above. In *Redwood Empire Publishing Co. v. California State Board of Equalization*, 255 Cal. Rptr. 514 (Cal. App. 1989), the California Appellate Court upheld a sales tax upon an advertising publication even though the sales tax law exempted newspapers. In *Times Mirror Company v. City of Los Angeles*, 192 Cal. App. 3d 170, 237 Cal. Rptr.

346 (1987), *app. dismissed*, 108 S.Ct. 743 (1988), the Court upheld a tax system in which a variety of businesses enjoying First Amendment protection had differential tax burdens. In *Medlock v. Pledger*, 301 Ark. 483, 785 S.W.2d 202 (1990), the Arkansas Supreme Court held that the First Amendment was violated by a sales tax imposed upon cable television sold to subscribers where no tax was imposed upon satellite television. However, the Court rejected an argument that cable television was entitled to tax exemption because newspapers and magazine sales were exempt. Petitions for Writs of Certiorari (Nos. 90-29 and 90-38) in *Medlock* are pending in this Court.

Accordingly, there is no uniformity among the state courts when confronted by a tax law which treats, for taxation, different types of media differently. Indeed, these courts are in hopeless conflict and this trend should continue in the absence of guidance from this Court. Since a substantial federal question is raised by the Tennessee Court's decision and since the state courts are issuing conflicting decisions and are struggling with this issue, this Court should grant Tennessee's Petition for Writ of Certiorari and give plenary consideration to this case.[1]

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[1] In addition to the state appellate decisions listed in the text, several trial courts have also considered the newspaper – magazine issue. In *The Hearst Corporation v. Iowa Department of Revenue and Finance*, No. AA-1401, Polk County District Court, November 6, 1989, an Iowa District Court upheld the Iowa sales and use tax law to the extent that it exempted all newspapers and shoppers guides from tax, but not magazines and

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Those state courts, including the Tennessee Court, which take the "all or nothing" approach toward uniform tax treatment of all speech rely upon this Court's decisions in *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) and *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1987). But, those cases did not directly address the questions presented in this case. In *Minneapolis Star*, a special state "use tax" upon newspaper components was invalidated for two reasons. First, the tax singled out the press for a special tax upon components not imposed upon other manufacturers of tangible personal property. Second, the

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other publications. This case is currently pending appeal in the Iowa Supreme Court and was submitted to that Court for decision on July 13, 1990. In *Merriken Publications, Inc. v. Comptroller of the Treasury*, 1989 Md. Tax Lexis 12, the Maryland Tax Court upheld the Maryland sales tax to the extent that it exempted all newspapers, but not the taxpayer's publication that listed real estate for sale in that state. The Maryland Tax Court properly observed:

> The exemption for newspapers is based on the unique historical role of newspapers. Newspapers have served and continue to serve the function of providing the public with a timely (in many cases daily), inexpensive, source of the news. The purpose of § 326(n) is not to unduly burden the production of other types of publications, but, instead to perpetuate the existence of timely, inexpensive newspapers. Given the unique historical role of newspapers and the state's interest in monitoring their existence, Petitioner fails to prove that the exemption for newspapers set forth in § 326(n) is not grounded upon a rational basis.

$4,000 tax credit left only a handful of publications subject to tax upon their components. Since Minnesota offered no justification for such selective taxation of the press, the "use tax" was invalidated. In *Arkansas Writers*, the Arkansas sales tax law exempted newspapers and sports, trade, professional, and religious publications, but not others. As applied to the taxpayer's general interest magazine, the tax was invalidated for two reasons. First, the effect of the exemption for sports, trade, religious, and professional publications was to leave only a few publications in the state subject to tax. Second, because the taxpayer also published some religious and sports articles in its magazine, the effect of the publication exemption was to create a discriminatory tax exemption based solely upon content. Since Arkansas offered no justification for such tax treatment, this Court invalidated it. Significantly, this Court declined to decide the very issue decided by the Tennessee Court and which Tennessee now presents in its Petition, namely, whether a tax exemption for newspapers, but not for other distinct publications, is valid. 481 U.S. at 233. Moreover, there is nothing in *Minneapolis Star* or in *Arkansas Writers* to suggest that this Court has deviated from the general rule that strict scrutiny is not per se applied whenever a state subsidizes or taxes some, but not all, speech.

Even though it is obvious that *Minneapolis Star* and *Arkansas Writers* did not directly address the issue in the instant case, the state courts which have taken the "all or nothing" approach have erroneously concluded that those cases did. Because that issue was left open by this

Court in *Arkansas Writers*, this Court should grant Tennessee's Petition for Writ of Certiorari and give plenary consideration to this case.[2]

Finally, it is not irrelevant to point out that states commonly have laws that confine publication of legal notices, proceedings, or other matter in "newspapers." For example, the Iowa Supreme Court requires notice to be served upon defendants who cannot be found by publication only in newspapers, in its rules of civil procedure. *See* Iowa R. Civ. P. 60-62. In addition, the federal government authorizes differential anti-trust treatment for newspapers. 15 U.S.C. §§ 1801-1804 and *see Austin v.*

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[2] The Tennessee Supreme Court dismissed this Court's decision in *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) as having "little or nothing to do with the abridgment of freedom of speech, or of the press contained in the First Amendment to the Constitution, which is the thrust of the complaint in this suit." This view of *Regan* is simply wrong. *Regan* is a First Amendment case. It recognizes tax exemptions as subsidies. It holds that the general rule is that a tax system that exempts some, but not all, speech is not inherently subject to strict scrutiny. 461 U.S. at 548. The state courts which insist on the "all or nothing" approach, including the Tennessee Court, have rendered decisions that are not consistent with *Regan*. Under *Regan*, states can subsidize all newspapers, and refuse to subsidize other publications, printed matter, or any other type of media. The Tennessee and other courts which have misapplied *Minneapolis Star* and *Arkansas Writers* have failed to appreciate or apply *Regan*. Tax exemptions are subsidies and a state's failure to exempt various media and speech is merely a refusal by the state to pay for it. Under *Regan*, the mere failure to exempt all speech does not invoke a strict scrutiny test that requires the state to justify the taxation of nonexempt speech and Amici believe that the Tennessee Court erred in applying that test in this case.

Michigan Chamber of Commerce, 110 S.Ct. 1391 (1990); *Committee For An Independent P.I. v. Hearst Corporation*, 704 F.2d 467 (9th Cir. 1983), *cert. denied*, 464 U.S. 892 (1983). The Tennessee and other state courts' "all or nothing" approach to taxation casts doubt on the validity of these state and federal laws. Therefore, the ramifications of the Tennessee decision transcend the tax issue in this case. These ramifications are far-reaching, affect many if not all of the states and the federal government, and justify this Court's granting of Tennessee's Petition and the giving of plenary consideration to this case.

V. CONCLUSION

Tennessee's Petition raises matters of vital concern to the Amici states and presents important questions which this Court has not directly addressed. Therefore, we urge this Court to grant Tennessee's Petition for a Writ of Certiorari and to give plenary consideration to the matter.

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